87-304

JUL 19 1987

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant

v.

BEATRICE COMPANIES, INC. et al.

Kohlberg, Kravis, Roberts & Co.

and Joel B. Smilow,

James L.Dutt,

Respondents, Defendants-Appellees.

APPENDIX

On Petition for Certiorari to

the Supreme Court of Delaware

William Leighton

Petitioner

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August, 1987

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DSC = Delaware Supreme Court

Ch. = Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

In re Beatrice Companies, Inc. Litigation

Consolidated Civil Action No. 8248

MEMORANDUM OPINION

Submitted: April 14, 1986

Decided : April 16, 1986

* * * * * * * * * * * * * *

ALLEN, Chancellor

The captioned consolidated action is brought both as a class action on behalf of stockholders of Beatrice Companies, Inc. (including those owning securities convertible into stock, but excluding defendants) and as a

derivative action on behalf of Beatrice itself (sometimes herein referred to as the "Company").

It constitutes a broadly-based challenge to the validity of key features of an agreements contemplating a leveraged buy-out of the Company by defendant Kohlberg, Kravis, Roberts & Co. ("KKR"). The relief sought by the amended complaint includes an order enjoining consummation of the merger that would effectuate KKR's purchase of all the Company's stock.

Pending is an application pursuant to Chancery Rules 23(e) and 23.1 for the approval as fair to Beatrice and members of the class, of a settlement of the claims alleged in the amended complaint. Notice of the proposed settlement and of the April 14,1986 hearing on the fairness of its terms, was mailed to

class members. This is this Court's opinion on the pending application and on the related request of twenty-one law firms representing various plaintiffs in these and related actions for an award of attorneys' fees for services provided in the lawsuits.

I.

An assessment of the fairness and adequacy of the proposed settlement to the Company and its present stockholders must start with a sketch of the facts out of which the dispute arises. Those facts, at this stage, appear largely agreed upon even if the motivating forces behind them and their legal consequences remain contested. It is elementary that on a motion of this kind it is not required (indeed not impossible) for the Court to determine

if the claims proposed to be settled would ultimately be found to be valid if put to the test of trial.

In the late summer of 1985 rumors apparently began to circulate in the financial community that Beatrice was or was likely to become the object of a takeover attempt. Such rumors allegedly caused concern among Beatrice's management and in response it is contended that the Compensation Committee of the Company's board of directors (which committee was comprised entirely of independent directors) modified the employment agreements of both select senior officers and a larger group -- approximately fifty in number -- of managers. These modifications allegedly provided wastefully extravagant protection to such officers

and managers in the event of a change in the control of Beatrice.

On October 16, 1985, KKR submitted to the board of Beatrice an offer to acquire the Company in a transaction in which Beatrice's stockholders would receive $40 in cash and $5 in market value of preferred stock for each share of Beatrice common stock. On October 20, 1985, after a report from its investment bankers, the Beatrice board rejected that offer as inadequate.

On October 29, 1985 KKR increased its offer to $40 in cash and $7 in market value of preferred stock. On October 31, 1985the Beatrice board authorized management to commence discussions with KKR with respect to its revised offer and to explore alternatives that would maximize the value of Beatrice to its

stockholders. Thereafter, the Company's investment bankers sought to determine whether there were other potential acquirors for the Company and, by November 10, 1985, it sent certain information designed to explore any such interest to approximately 75 potential buyers.

At about that time, the Dart Group Corporation, in connection with E.F. Hutton & Co., Inc., expressed an interest in acquiring Beatrice for $48 per share in cash. On November 12, 1985, KKR offered to acquire Beatrice in a transaction consisting of $43 in cash and preferred stock of the Company to be formed to acquire Beatrice; the preferred stock was to have a market value of $7. This offer was conditioned, among other things, on

Beatrice's agreement to (1) a provision (the "Termination Payment Provision") that, if the acquisition were not completed but other conditions were met, including the acquisition by another party of 30% of Beatrice's outstanding common stock or a firm proposal to acquire Beatrice at a consideration equivalent to more than $50 per share, KKR would be entitled tc a cancellation fee of $123 million, and (2) a provision (the "Asset Option Agreement" granting to KKR an option to purchase either Beatrice's grocery food and Tropicana subsidiaries for $2.391 billion or certain alternative assets, also including the Tropicana subsidiary, for a price of $2.412 billion. KKR's November 12 offer was conditioned upon acceptancence by Beatrice no later than November 13, 1985.

The Beatrice board met on November 13 and 14, 1985 and heard the opinions of its investment banking firms - Salomon Brothers and Lazard Freres - that the consideration offered by KKR was fair to the holders of Beatrice's common stock from a financial point of view. Also, the board learned at that time that the Dart-Hutton offer had been withdrawn. The complaint alleges that at about that time the board conferred upon senior management additional rights triggered by a change in control and was advised that KKR had agreed to honor these modifications of the Company's employment compensation agreements.

The Beatrice board accepted KKR's terms and agreed to a merger agreement which, among other things, prohibited the solicitation of alternative proposals or offers for Beatrice or any

of its subsidiaries. The board also agreed to the lock-up options and the cancellation fee provisions. The first of these suits was filed on November 15, 1986, although an earlier related case challenging the August compensation agreements had been filed in Illinois state courts.

In December, 1985, KKR was provided access to Beatrice's books and records. It determined, at that point, that the available cash flow from the Beatrice businesses was insufficient to support its November 12 merger proposal. Accordingly, on January 8, 1986, KKR sought to modify the terms of its November 12 offer by changing the consideration payable for each share of Beatrice common stock to $40 in cash and 10/25th of a share of preferred stock of the acquiring company, which would have

a liquidation preference of $25 per share and would pay a semi-annual dividend at the rate of 14% per annum, with KKR having the right to pay dividends for 6 years in additional shares of such preferred stock instead of cash.

At a January 15, 1986 meeting, the Beatrice board authorized its financial and legal advisors to develop and explore other possible options open to Beatrice. Thereafter, representatives of Beatrice had extensive discussions with representatives of KKR and with the representatives of the plaintiffs in these consolidated actions. As a result of these negotiations, modifications were made to the agreement of merger (e.g. eliminating the lock-up and the no-shop provisions and modifying the consideration to be paid in the merger), and to the employment and consulting

agreements of Beatrice's executives. These changes, which are spelled out in slightly more detail below, provide the basis for the stipulation of settlement presently before the Court.

II.

Consolidated in this court are nine actions arising out of the foregoing facts; seven related actions filed in Illinois courts, also challenging those actions have recently been dismissed without prejudice in connection with the stipulation of settlement. A "Unified Consolidated and Amended Complaint" has now been filed. It names as defendants the Company, KKR and all of the directors of the Company. The claims proposed to be settled by the Stipulation of Settlement are set forth in the amended complaint in three counts.

Count I of the amended complaint purports to allege at least 8 separate grounds for relief.

(1) It challenges the August, 1985 amendments to the employment agreements of Beatrice's officers and senior management as constituting a waste of corporate assets and a breach of fiduciary duty.

(2) It challenges the granting of certain termination rights to certain officers and key empoyees (in the jargon "golden parachutes") which the complaint alleges obligates the Company to pay up to $63.5 million. These rights are said to constitute a breach of fiduciary duty, a gift and waste of corporate assets.

(3) It asserts that the board breached its duty of care in that it failed to actively shop the Company

before accepting the November 12 offer of KKR.

(4) it challenges the Asset Option Agreement as serving no valid corporate purpose and as serving as a device wrongfully to inhibit bidding on the Company.

(5) It challenges the Termination Payment Provision as a waste of assets and as a device to inhibit competitive bidding.

(6) It challenges the consideration to be received pursuant to the November 12 KKR offer as inadequate ;

(7) It challenges the adequacy of the public disclosures made with respect to the proposed transaction; and

(8) It alleges that KKR knowingly participated in the foregoing alleged breaches of duty and thus is liable for damages arisinig from those acts.

Count II of the amended complaint

purports to assert derivatively claims of Beatrice. Count II challenges the obligation of the Company to make certain employment termination payments and the obligation of the Company to pay a termination fee to KKR as wrongs to the Company itself.

Count III is limited to claims of breach of duty including waste of the Company's assets, arising from payments that the Company obligated itself to make to its former chairman in connection with his resignation from office in August, 1985.

III.

Following the January, 1986, three-party negotiations referred to above, a memorandum of understandding was entered into that forms the basis for the settlement of the foregoing

claims. Pursuant to the terms of that memorandum (1) the Asset Option Agreement has been terminated and Beatrice obligated itself not to grant to KKR any further option with respect to its assets, (2) the $123 million cancellation fee was reduced to approximately $19 million, (3) the November, 1985 merger agreement has been revised to delete the no-shopping provision which has led to a thorough search by the Company's investment bankers for alternative offers for the Company; (4) the right of the Company to pay a cash dividend of up to $.45 per share of common stock and $.845 per share of preference stock was expressly confirmed and (5) consideration to be offered for each share of the Company's common stock was altered to consist of $40 in cash and 10/25th of a share of

preferred stock, which would have an annual dividend rate not of 14% as offered on January 8, but 15¼% payable quarterly.

In addition, the memorandum of understanding contemplated certain changes in executive compensation which would result in savings to Beatrice and which presumably contributed to KKR's ability to increase the interest rate that the preference stock to be issued in connection with the merger is to bear.

The modification of the employee bonus plans contemplated by the memorandum of understanding will reduce executive compensation triggered by a change in control by an amount estimated to be in excess of $23 million. In addition, certain non-qualified stock options having an approximate value of $1.8 million have been surrendered. The

memorandum of understanding further provides for additional reductions in executive compensation and for payment by Beatrice, in connection with the closing of the proposed merger, of $5 million to the holders of Beatrice common stock of record at the effective time. Finally, the memorandum of understanding provides that consummation of the settlement would be subject to, among other things, approval by the Beatrice board, consummation of the merger (or an alternative transaction arising as result of Beatrice's freedom to solicit alternatives), the completion by plaintiffs of further discovery and depositions in the consolidated litigation and Court approval of the settlement and the dismissal of the actions with prejudice.

IV.

In reviewing the terms of the

proposed settlement, I conclude that both Beatrice and the class on whose behalf these actions are prosecuted will receive real and substsantial benefits therefrom. Indeed, certain negotiated changes, such as the rescission of the no-shopping provision have already conferred important (if non-quantifiable) benefits on the Company's shareholders; even though it appears that the canvassing of alternatives has lead to no alternatives to the KKR offer, shareholders now have the comforting knowledge that no higher offer from a third-party has been overlooked. Other benefits --- such as the reduction of the termination payment to KKR --- will in all likelihood not result in the realization of financial gain to the Company or its stockholders, since the merger appears now very likely to be effectuated. Yet such benefit can be said therefore to be ephemeral only

in the sense that a life insurance policy can be said in retrospect to have been of no value to a still living man.

More important, however, are the financial improvements that the settlement contemplates. I will mention three. The increases from 14% to 15⅛% of the interest to be paid on the preferred stock has been valued by Salomon Brothers as worth at least $1.06 per share of Beatrice common (or more than $130,000,000 to the class). The payment of the March dividend contemplated by the memorandum of understanding --- which could resasonably have been resisted by KKR at least without an offsetting price adjustment --- has a value of some $55,000,000 to the class. In addition, the $5,000,000 additional payment to the Company's stockholders at closing is not a insignificant benefit. I need not now

further consider the reduction in executive compensation, that was negotiated since the benefits thereby conferred on the Company are probably implicitly reflected in the enhanced interest rate that KKR has agreed to pay with respect to the preferred.

In addition to finding these benefits substantial, I conclude that they constitute fair and reasonable compensation for the dismissal of the claims asserted in the amended complaint. While I need not finally evaluate those claims, two things may be said about them that relate to the current applications. First, without endorsing in any respect the theories that give rise to these suits, I note that the suspicion that generated them --- that is the worry that the Beatrice management was attempting too hurriedly to promote the sale of the Company

perhaps to an entity favored by it so as to protect management's position and benefits --- was understandable in the circumstances. Second, given the important fact that the board of Beatrice is comprised largely (more than 50%) of outside directors who had no financial interest in the various transactions alleged, the complaint's conclusory allegations attempting to make out a breach of duty of loyalty seem --- at first blush at least --- not to have much weight. And as to the claim of breach of duty of care, history has shown it to be a very rare case in which the judgment of disinterested directors who follow a deliberate process in reaching a business decision will be found to have breached that duty. Thus, I conclude that the burden assumed by plaintiffs in order to achieve a judgment in these cases was a very heavy one.

I therefore conclude that the substantial benefits contemplated by the stipulation of settlement are more than fair and reasonable compensation for the release of the claims asserted in the amended complaint

V.

In making the determination that the proposed settlement is fair, reasonable and adequate, I have considered the views of the three stockholders who have sent written statements to the Court objecting to the application. The complaint of Mr. and Mrs. Kent is that they ought not be forced to liquidate their position in Beatrice against their will. However, in matters of this kind, as in other important public matters, the law subjects the rights of the Kents to the will of an informed majority vote. Some 98% of the voting Beatrice shareholders

have approved the proposed KKR merger. If dissenting shareholders are dissatisfied with a merger, the law provides an appraisal remedy for them in appropriate circumstances.

Mr. Joseph Yablonski complains that the price KKR will pay is too low, that the attorneys for plaintiff have contributed nothing to the improved terms of the present KKR deal and that the defendants have agreed to the settlement simply in order to protect themselves from future claims of personal liability. As to the first poiint, Mr. Yablonski's opinion on value may be sound, but it is inconsistent with the opinion of Salomon Brothers, with the overwhelming approval of the deal by the votinig Beatrice stockholders, and more importantly, inconsistent with the fact that no alternative offer was forthcoming after

a thorough search (which was unimpeded by the lock-up agreement on the $123 million termination fee). In these circumstances, if it were part of my responsibility on this application to determine whether the terms of the proposed merger reflect a fair and adequate price (which it is not), I could point to nothing to support Mr. Yablonski's view that the price offered is "too low".

Mr. Yablonski's contention that this litigation contributed nothing to the improved terms of the present KKR deal is dealt with below. As there explained, I cannot conclude that there is a "but for" relationship betweeen this litigation and all of the benefits achieved by the memorandum of understanding; I do find that plaintiffs' counsel and the pendency of these claims had a substantial and important role in the achievement of

those benefits.

Finally, as to the notion that defendants are here motivated to agree to the settlement (including the fee application) simply to protect themselves from later litigation, I note that counsel for Beatrice has represented to the Court that the subject of a fee was not discussed between defendants' counsel and plaintiff's counsel "until after there had been specific agreement on each of the substantive terms" of the memorandum of understanding. Secondly, putting aside the slippery question of motive, I have concluded that the settlement is fair.

Finally, I have considered the request of Mr. Leighton to defer ruling on the pending application based upon his view of federal law. I find in Mr. Leighton's submission no persuasive basis to delay acting on the matter now

before me.

VI.

Turning to the application of some 21 law firms, representing plaintiffs in various of the actions involved, for an award of fees, I note initially several preliminary points. First it is proper to make such an award from the benefit created by a class or derivative action, Gottlieb v. Heyden Chemical Corp.,Del.Supr., 105 A.2d 461 (1954). Our courts have frequently acknowledged the appropriateness in derivative or class litigation of spreading the costs of litigation fairly among those who benefit by it by awarding to successful attorneys a fee to be paid from the fund created by the litigation. See, e.g. Sugarland Industries, Inc. v. Thomas,Del.Supr., 420 A.2d 142 (1980).

Second, I note that the benefits to be realized by the members of the class

from the memorandum of understanding, will not be reduced in any respect by the award of an attorney's fee in this instance since such an award will be paid by Beatrice (and thus by KKR or others who may own Beatrice following the merger).

In Allied Artists Pictures Corp., v. Baron, Del.Supr. 413 A.2d 876 (1980), our Supreme Court set forth the appropriate tests to determine whether counsel in a derivative case that has not gone to judgment had placed themselves in a position to benefit from the rule that permits the award of attorneys' fees in such cases. In Allied Artists the Supreme Court applied a three-fold test:

> ... Plaintiffs' counsel would be entitled to attorneys' fees and costs where: the suit was meritorious when filed [1]; action producing benefit to the corporation was taken by the

defendants before a judicial resolution was achieved; and the resulting corporate benefit was causally related to the lawsuit. 413 A. 2d at 878.

Where this test is met, it does not, of course, inform the Court's discretion as to the amount of an appropriate fee, but rather simply indicates that a fee is appropriately awarded. The pending application does present, in my opinion, some question as to the third element of the Allied test. In the typical case challenging the fairness of the terms of a merger, where the merger terms are improved following institution of the lawsuit, there is little question that the lawsuit itself was the principal and perhaps the sole reason for such improved terms. That is so because most frequently in cases of this kind the defendants stand on both sides of the transaction and have no

incentive to unilaterally improve the terms of an announced merger. See, e.g. Joseph v. Shell Oil Co., Del. Ch., C.A. No. 7450, Hartnett, V.C. (April 19, 1985).

In contrast, in this instance since the board of Beatrice was itself independent of KKR, there is no reason for the Court to assume that that board would not have attempted to negotiate the best available terms following receipt of the January 8, 1986, KKR modified offer. Certainly I cannot say, as one could say in a more typical shareholder challenge to a cash-out merger that is terminated with improved terms,that but for the shareholder litigation those improved terms would not have been achieved.

However, in these circumstances, the law presumes a causal connection between plaintiffs' efforts and the benefits. McDonnell Douglas Corp. v.

Palley, Del.Supr., 310 A.2d 635 (1973). But beyond that, having questioned counsel both for plaintiffs and for Beatrice at the hearing on the pending applications on the subject, I am in fact persuaded that plaintiffs' counsel and this litigation played a significant part in achieving the benefits contemplated by the memorandum of understanding. In these circumstances, I conclude that the tests of Allied Artists is met;that is, I conclude that the benefit is causally related to the lawsuit. I turn then to the question of what fee is appropriate in these circumstances.

In fixing the amouont of an award in these circumstances, the Court is called upon to exercise discretion informed by all of the pertinent circumstances. Krinsky v. Helfand,Del. Supr., 156 A2d 90 (1959). As this Court

has recently noted:

> The determination of reasonableness is the end result of a process that requires the Court to consider and weigh a host of subsidiary factors, which include :
>
> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the service; and
>
> (8) whether the fee is fixed or contingent.

Fox v. Chase Manhattan Corp., Del. Ch. C.A. No. 8192-85, Jacobs, V.C. (December 9, 1985).

Here, twenty-one law firms have represented plaintiffs in the sixteen actions covered by this application. Some ten thousand pages of documents were produced and depositions in several states were conducted. The work was doubtlessly intensive when required since I am informed that 4,800 hours of time were dedicated to the case which has been relatively short-lived.

The results as measured by the memorandum of understanding have been very beneficial. Plaintiffs calculate the total financial benefit to the class to be more than $200 million and the record supplies justification for such evaluation. The application is for an award of $3,200,000.

Petitioners' counsel include among their number highly experienced and competent counsel who specialize in prosecuting shareholder claims. In this

litigation, as in most litigation of this kind, remuneration of plaintiffs' counsel lis entirely contingent upon achieving a result beneficial to the shareholders of the company on whose behalf the action is prosecuted legally.

The specific role of this litigation in achieving the benefits involved cannot finely be fixed without a great deal of inquiry which --- since neither Beatrice nor KKR oppose the fee application --- no party has a financial interest in pursuing. It does seem clear that this litigation and the attorneys prosecuting it did have some significant role in achieving those benefits. Since the application is for a small percentage of those benefits (1.6% assuming the $200 million value mentioned above) and will be paid directly by Beatrice and not the class, I am persuaded that the amount

requested is fair and reasonable in the light of the work involved, the contingent nature of the undertaking and the other appropriate factors.

For the foregoing reasons, I have today signed the form of final order consented to by all the parties and supplied to the Court at the hearing on the pending application.

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[1] In this context "meritorious" means capable of withstanding a motion to dismiss if, at the same time, plaintiff possesses knowledge which holds out some reasonable likelihood of ultimate success. Chrysler Corporsation v. Dann, Del. Supr. 223 A.2d 384 (1966). I regard the complaint as stating fairly litigable claims and thus conclude for these purposes it is "meritorious" as that term is used in Dann.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

In re Beatrice Companies, Inc. Litigation

Consolidated Civil Action No. 8248

ORDER AND FINAL JUDGMENT

On this 16th day of April, 1986, a hearing having been held before this Court to determine whether the terms of the Stipulation and Agreement of Compromise and Settlement, dated March 11, 1986 (the "Stipulation"), and all transactions referred to therein or preparatory or incident thereto, and all such transactions taken as whole, are fair, reasonable and adequate for the settlement of all claims asserted herein; and whether judgment should be entered in this consolidated civil action (the"Action") dismissing on the merits with prejudice as against the plaintiffs and all holders (other than defendants)

of Beatrice Common Stock, Beatrice Preference Stock and all holders (other than defendants) of any security convertible into or exercisable for Beatrice Common Stock (including Warrants and Convertible Debentures) at the close of business on February 20, 1986 and their successors in interest or transferees, immediate and remote, and as against Beatrice Companies, Inc. ("Beatrice") with respect to the purported derivative claims; and the Court having considered all matters submitted to it in this Action at the hearing and otherwise; and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to all holders of record (other than defendants) of Common Stock and Preference Stock of Beatrice and to all holders (other than defendants) of any security convertible into or

exercisable for Beatrice Common Stock (including Warrants and Convertible Debentures) at the close of business on February 20, 1986, as shown by the records of Beatrice, at the respective addresses set forth in such records; and it appearing that a short form notice of the Hearing substantially in the form approved by the Court was published in the national and international editions of The Wall Street Journal on March 13 - 14, 1986; and that Beatrice has used reasonable efforts to give notice to all beneficial owners of such securities who were such owners at the close of business on February 20, 1986,

NOW, THEREFORE, IT IS HEREBY ORDERED that :

1. The Stipulation and Settlement and all transactions referred to therein or preparatory or incident thereto, and all such transactions taken

as a whole, are approved as fair, reasonable and adequate, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

2. The Action is hereby dismissed on the merits as to all defendants and with prejudice against plaintiffs and all members of the certified class and against Beatrice with respect to the purported derivative claims, without costs except as provided in the Stipulation, such dismissal being subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation.

3. Plaintiffs and all members of the certified class are hereby permanently barred and enjoined from instituting or prosecuting, either directly, representatively, derivatively

or in any other capacity, any other action against anyone asserting claims which are Settled Claims as defined in the Stipulation.

4. The plaintiffs' attorneys are hereby awarded the sum of $3,200,000 in fees inclusive of disbursements in connection with the Action, which sum the Court finds to be fair and reasonable sand which shall be paid to plaintiffs' attorneys by Beatrice in accordance with the Stipulation.

5. Jurisdiction is hereby reserved over all matters relating to the administration and consummation of the terms of the Stipulation and the payment of attorneys' fees and expenses.

/s/ William T. Allen,

Chancellor

CONSENTED TO :

MORRIS & ROSENTHAL, P.A., by /s/ J.A. Rosenthal, *** on behalf of all plaintiffs

RICHARDS, LAYTON & FINGER, by /s/ R. Franklin Balotti, *** on behalf of

defendants Beatrice Companies, Angelo R. Arena, Bernard A Monaghan, Omer G. Voss, Murray L. Weidenbaum, Alexander Brody, G.A. Constanzo, Walter J. Leonard, Goff Smith, James W. Cozad, Cedric E. Ritchie, William G. Karnes, Jayne B. Spain, Russell Wagner, William W. Granger, Jr., David E. Lipson, Frank E. Grzelecki, Antony Luiso, William S. Mowry and Richaard J. Pigott

POTTER, ANDEERSON & CORROON, by /s/ Robert K. Payson * * * on behalf of defendants Kohlberlg Kravis Roberts & Co. and Joel B. Smilow

LASSEN SMITH KATZENSTEIN & FURLOW, by /s/ Craig B. Smith *** on behalf of defendant James L. Dutt

COURT OF CHANCERY

OF THE STATE OF DELAWARE

William T.Allen, Chancellor

Courthouse, Wilmington, Delaware 19801

April 25, 1986

Re: Beatrice Companies, Inc. Litigation

Civil Action No. 8248

Dear Mr. Leighton:

I have received your letter of April 21, 1986, concerning the captioned matter. The Court's memorandum opinion and order dated April 16, 1986, reflects my best judgment concerning the appropriate disposition of the motions there treated. Therefore, treating your letter as a motion for reargument, I will decline to modify that order in any respect.

Very truly yours,

/s/ William T. Allen

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation

No. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted : May 21,1986
Decided: June 11, 1986

O R D E R

This 11th day of June, 1986, it appears to the Court that :

(1) On April 16, 1986, the Court of Chancery entered in the Consolidated Civil Action No. 8248 an Order and Final Judgment (the order) approving as fair, reasonable and adequate the terms of a Stipulation and Agreement of Compromise dated March 11, 1986 (the settlement). The petitioner, Leighton, has moved in this Court to vacate the order and to

remand the matter to the trial court for the entry of a new order. Alternatively, Leighton seeks a stay of the order.

(2) Leighton alleges certain deficiencies in the order, including a failure to identify the scope of the class affected, purportedly in violation of Chancery Court Rule 23(c)(3), a failure to name the class representative, and the improper incorporation into the order, by reference to the stipulation, of the terms of the preclusive effect of its injunction, in violation of Chancery Court Rule 65(d).

(3) Chancery Court Rule 23(c)(3) requires that the judgment shall include and describe those found by the Court to be members of the class. The order, the stipulation of settlement and compromise, the order directing issuance of notice and the approved form of notice actually

sent to the Beatrice stockholders, all identified the class affected by the settlement. Although Rule 23 does not require that the Court name the class representatives, their status and identity were recognized in the Court's order, dated March 11, 1986, directing notice to the class.

(4)Contrary to appellant's assertion, the order complies with Rule 65(d) in listing the acts to be restrained, including an injunction prohibiting all the class members from asserting settled claims. See Ezzes v. Ackerman, Del. Ch. 234 A.2d 444 (1967). Moreover the rule permits incorporation by reference if the incorporated document is distributed to the restrained party as well. This requirement was satisfied by distribution to the class members of the notice, which specifically details the

settled claims. Leighton claims that he was not served with the stipulation; howeveer, he is not a member of the class and there is no requirement of distribution to him.

(5) Regarding appellant's motion to remand for a determination on the merits of his unsupported charges of "fee splitting", this issue was not raised below and we will not consider it now. Supreme Court Rule 8.

NOW,THEREFORE IT IS ORDERED that appellant's motion be, and the same hereby is,

DENIED.

BY THE COURT:

/s/ A.G. Moore, II

Justice

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation

No. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted :July 7, 1986

Decided : August 15, 1986

O R D E R

This 15th day of August, 1986, the Court having considered appellants' opening briefs in support of their appeals and appellees' motion to affirm pursuant to Supreme Court Rule 25(a), this Court has concluded that it is not manifest on the face of the briefs that the appeal is without merit. The Court requests however, that in the further briefing the parties give particular attention to the issues raised in Points

IV, VI, VII and VIII of appellant Leighton's opening brief.

NOW THEREFORE, IT IS ORDERED that the appellees' motions to affirm are DENIED.

/s/ANDREW D. CHRISTIE

Chief Justice

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation
No. 155 and 156, 1986, Consolidated
Court below - Court of Chancery for
the State of Delaware in and for New
Castle County - C.A. 8248, Consolidated

O R D E R

This 17th day of February, 1987, appellant William Leighton having moved to supplement the record by letters dated October 24, 1986, November 1, 1986 and February 10, 1987, it appears to the Court that :

(1) This case was submitted on briefs on November 6, 1986 and is currently under consideration.

(2) Leighton's letters concerning a notice to BCI debenture holders, the fee arrangement of one of Beatrice's counsel, and alleged insider trading by one of Beatrice's counsel are irrelevant

to the merits of the pending case.

NOW, THEREFORE, IT IS ORDERED, sua sponte, that apellant William Leighton's requests to supplement the record are DENIED.

/s/ Henry R. Horsey

Justice

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation No. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted :November 6, 1986

Decided : February 20, 1987

Before CHRISTIE, Chief Justice, HORSEY AND MOORE, Justices.

O R D E R

This 20th day of February, 1987, upon consideration of the briefs of the parties, it appears to be Court that :

(1)Appellants, Willilam Leighton ("Leighton") and Joseph A. and Shirley S. Yablonski ("the Yablonskis"), appeal from a decision of the Court of Chancery approving the settlement and dismissal of consolidated stockholders' class and derivative actions against Beatrice Companies, Inc. ("Beatrice")' Kohlberg,

Kravis, Roberts & Co. ("KKR"); and Joel E. Smilow, a member of the KKR investment group. The settlement disposed of all claims arising out of the acquisition of Beatrice, through a leveraged buy-out, organized by KKR.

(2) On October 16, 1985, KKR submitted to Beatrice's Board of Directors an offer to acquire the company in a transaction in which Beatrice's stockholders would receive $40 in cash and preferred stock valued at $5 per share for each share of Beatrice common stock. The Board however, after consulting its investment bankers, unanimously rejected the offer as inadequate.

(3)On October 29, 1985, KKR made a second proposal in which it increased its offer to $40 in cash

and $7 in market value of preferred stock. The Board authorized management to begin discussions with KKR in respect to its revised offer and to explore alternatives that would maximize the value of Beatrice to its stockholders. Thereafter, Beatrice's investment bankers contacted approximately seventy-five potential buyers to determine whether they were interested in acquiring all or part of Beatrice. In response to these inquiries, Dart Group Corp. expressed an interest in acquiring Beatrice for $48 per share in cash.

(4) On November 12, 1985, KKR made a revised offer to acquire Beatrice in a transaction consisting of $43 in cash and preferred stock valued at $7 per share. This offer, however contained the following

conditions : (a) a provision (the "Termination Payment Provision") that, if the acquisition was not completed and another party acquired thirty percent of Beatrice's common stock or made a firm proposal to acquire Beatrice for more than $50 per share, KKR would be entitled to a cancellation fee of $123 million; and (b) a provision (the "Asset Option Provision") granting KKR an option to purchase either Beatrice's grocery food and Tropicana subsidiaries for $2.391 billion or certain alternative assets, including the Tropicana subsidiary, for a price of $2.412 billion. The November 12 offer was conditioned upon its acceptance by the Board by no later than November 13, 1985.

(5) On November 13 and 14, 1985, at a special Board meeting, Beatrice's investment bankers indicated that from a

financial point of view, KKR's November 12 offer was fair to Beatrice's stockholders. The Board also learned that the Dart Corp. had withdrawn its earlier offer. Additionally, KKR agreed to cause Beatrice, after the proposed merger, to honor amendments to existing executive compensation and severance agreements that the Board had authorized prior to the initial KKR proposal.

(6) On November 14, 1985, the Board accepted KKR's November 12 offer and entered into (a) a merger agreement with BCI, a corporation KKR formed for the acquisition, which included the Termination Payment Provision; and (b) a separate agreement with BCI adopting the Asset Option Provision. The merger agreement also prohibited the solicitation of alternative proposals or offers for Beatrice or any of its subsidiaries.

(7) Plaintiffs filed nine class

and derivative claims in the Court of Chancery and seven related actions were filed in Illinois. These actions were subsequently consolidated in this proceeding. The complaints basically alleged (a) that Beatrice's officers and directors, aided and abetted by KKR, had breached their fiduciary duties to the Beatrice stockholders in entering into the merger agreement and the executive compensation and severance agreements; and (b) that the Termination Payment Provision was excessive and illegal and the Asset Option Provision invalid. Plaintiffs sought damages, an order enjoining the operation of the Termination Payment and Asset Option Provisions; and an order enjoining consummation of the proposed merger.

(8) Following extensive negotiations between Beatrice, KKR, and

the plaintiffs, the parties entered into a memorandum of understanding on February 1, 1986. The memorandum terminated the agreement containing the Asset Option Provision; reduced the $123 million Termination Payment Provision to approximately $19 million; revised the merger agreement to delete the no-shopping provision, thus, allowing Beatrice to solicit other offers or proposals; confirmed Beatrice's right to pay a cash dividend of up to $.45 per share of common stock; and increased the annual interest rate on the BCI preferred stock issue in connection with the merger from 14 percent to 15-1/4 percent to be paid on a quarterly instead of a semiannual basis. Beatrice and its executives also agreed to reductions of $23 million in their executive compensation and severance agreements.

(9) On March 11, 1986, the parties entered into a stipulation and agreement of settlement in accordance with the terms of the memorandum. Thereafter, the Court of Chancery certified a class consisting of all Beatrice stockholders at the close of business on February 20, 1986 (the record date for the stockholder vote on the proposed merger) and ordered a hearing to determine if the settlement was fair and adequate. Notice of the hearing was mailed to the February 20 holders of record, advising them of their right to appear and object.

(10) Although Leighton and the Yablonskis did not appear at the hearing, both parties submitted written statements objecting to the settlement. Leighton objected on the grounds that BCI was in violation of the various provisions of the federal securities laws. The Yablonskis challenged the

certification of the class, the conduct of the parties' attorneys, the adequacy of the terms of the proposed settlement, and the plaintiffs' attorneys' fee request.

(11) After careful review, the Court of Chancery determined that the benefits provided to Beatrice and the class constituted "fair and reasonable compensation for the claims". The Court also found the application of plaintiffs' counsel for attorneys' fees to be "fair and reasonable in the light of the work involved, the contingent nature of the undertaking and the other appropriate factors."

Thereafter, on April 16, 1986, the Court entered an order dismissing the claims with prejudice.

(12) On appeal, Leighton raises numerous arguments, many of which were

not raised below, based upon provisions of the federal securities laws. Leighton, however, concedes that he did not purchase his Beatrice stock until sometime afater : (a) the time of the Beatrice directors' alleged breach of fiduciary duty; (b) February 20, 1986, the record date for the stockholder vote on the proposed merger; and (c) he reviewed the March 11, 1986 proxy statement and the terms of the merger and settlement.

(13) Under settled Delaware law, an objector who purchases a claim by buying stock after the alleged wrongdoing has occurred lacks standing to challenge the wrongdoing in a derivative capacity. See 8 Del.C. Sec. 327; Newkirk v. W.J. Rainey, Inc. Del. Ch., 76 A.2d 121, 123 (1950). Section 327 provides that a plaintiff cannot maintain a derivative

action challenging corporate mismanagement unless he was a stockholder at the time of the transaction complained of or had his stock devolve upon him by operation of law. 8 Del.C. Sec. 327. The purpose of this section is to prevent potential plaintiffs from purchasing stock in order to maintain a derivative action attacking a transaction which occurred prior to the purchase of the stock. Schreiber v. Bryan, Del. Ch. 396 A.2d 512, 516 (1978); Jones v. Taylor,Del.Ch. 348 A.2d 188, 191 (1975); Newkirk, supra.

(14) In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged. Newkirk, supra. Therefore, Leighton clearly lacks

standing to challenge derivatively the merger; and he concedes he does not meet class certification. Therefore, his claims must be dismissed.

(15) The Yablonskis assert essentially two arguments; one, the settlement was not fair and reasonable to the shareholders because it extinguished valuable claims for inadequate consideration; and that as to absentee shareholders, the settlement procedures lacked due process; and two, that the Chancery Court abused its discretion in its award of attorneys fees.

(16) The Yablonskis' due process aragument was not raised prior to or at the settlement hearing, which the Yablonskis did not attend. It was included in a post-hearing letter to the Court by the Yablonskis, taking exception to the

> proliferating abuse of the class action mechanism to extinguish legitimate damage claims, to insulate corporate wrongdoers from judicial scrutiny and to sanction the payment of grossly excessive, wholly-unwarranted attorneys fees to class counsel by an opposing party. My due process rights and the due process rights of thousands of other Beatrice stockholders require, at a minimum, close scrutiny if not presumptive invalidity of settlements such as the one involved here.

An examination of the record and of the Court of Chancery's careful consideration of the issues that were timely raised require rejection of the asserted due process claim as factually and legally unsubstantiated. Here, there is no assertion that the settlement procedure of the derivative and class suits did not fully comply with the controlling rules of the Court of Chancery, Rules 23 and 23.1. Thus, weid v. Valhi, Inc., Del. Supr., 466 A.2d 9 (1983), upon which the

Yablonskis rely, is clearly inapposite.

(17) The Yablonskis' due process argument is simply an inarticulated use of a code word for their principal assertion that the settlement was "intrinsically unfair" and is, thus, subsumed within their argument one, attacking the fairness of the settlement to the Beatrice shareholders.

(18) Our standard of review of the settlement of a class or derivative action is well established. This Court should "review the record solely for the purpose of determining whether or not, by the exercise of his business judgment, the Chancellor abused his discretion." Neponsit Inv. Co. v. Abramson, Del. Supr., 405 A.2d 97, 100 (1979). It is not our function to determine the intrinsic fairness of the settlement or to exercise our own business judgment

respecting the merits. Polk v. Good, Del. Supr., 507 A.2d 531, 536 (1986). Rather we limit ourselves solely to the question of whether the Court abused its discretion in exercising its business judgment. Polk, supra. If its findings are supported by the record and are the product of an orderly and logical deductive process, they will be accepted. Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972).

(19) The Court --- after considering the benefits conferred on Beatrice's stockholders due to the negotiated changes, the financial improvements that the settlement contemplated, and the arguments of the stockholders who objected to the merger --- concluded that the settlement was fair and reasonable. Based upon our review of the record, we find ample evidence to support the Chancellor's

conclusion that "both Beatrice and the class . . . will receive real and substantial benefits from the settlement." Accordingly, the Court of Chancery did not abuse its discretion in approving the proposed settlement.

(20) Our standard of review of the Yablonskis' second argument, two is whether the Court abused its discretion in its award of attorneys' fees. Krinsky v. Helfand, Del. Supr., 156 A.2d 90, 95 (1959). Here, the Court found that "the amount requested is fair and reasonable in the light of the work involved, the contingent nature of the undertaking and the other appropriate factors." The record discloses that the Court properly considered counsel's time and effort in the lawsuit and the Court's reasoning for its conclusion. It also weighed the amount of the award with the benefits the

Beatrice stockholders received. Hence, we find no abuse of discretion and conclude that the Court properly approved the application for attorneys' fees.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be and the same is

AFFIRMED.

BY THE COURT:

/s/ Henry R. Horsey

Justice

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation Nos. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted : March 9, 1987

Decided : March 24, 1987

O R D E R

This 24th day of March, 1987, the Court having considered appellant William Leighton's Motion for Reargument pursuant to Rule 18 filed March 9, 1987, and it appearing that the Motion is without merit, NOW, THEREFORE, IT IS ORDERED that the appellant's Motion be, and the same hereby is DENIED.

BY THE COURT :

/s/ Henry R. Horsey

Justice

COURT OF CHANCERY
OF THE STATE OF DELAWARE

William T. Allen, Chancellor
Courthouse, Wilmington, Delaware 19801

June 23, 1987

Messrs. Leighton, Payson, Balotti and
Rosenthal

Re : Beatrice Companies Litigation

Civil Action No. 8248

Gentlemen:

William Leighton, claiming to be a member of the class on whose behalf the captioned class action was litigated has moved "pursuant to the reservation of jurisdiction contained in the Order and Final Judgment of April 16, 1986" to have the Court vacate the judgment asserting that material information was not disclosed to the Court at the time the proposed settlement of this matter was approved pursuant to Rule 23(e). He now seeks, among other things, to have the court order an audit by independent

accountants of the profits realized by defendant Kohlberg, Kravis and Roberts as a result of the merger out of which the litigation grew.

Defendaants resist the request on the bases that (1) the Final Judgment in this matter was affirmed by the Supreme Court and the reservation of jurisdiction goes only to the effectuation of the terms of the settlement, (2) the "new matter" asserted does not meet the tests of Rule 60(b), and (3) in all events, the Supreme Court has held, conclusively, that Leighton had no standing to object to the terms of the merger, having purchased his Beatrice stock after the announcement of the proposed merger.

I have reviewed each of Mr. Leighton's five submissions in support of the requested relief. The claims made therein do not seem to me to meet the test required to open a judgment. See

See Poole v. N.V. Deli Maatschappij, Del. Ch., 257 A.2d 241 (1969). Specifically, the information contained therein does not suggest to me that had assertions of this type been made at the settlement hearing, a different result might likely have occurred. More fundamentally, however, I think defendants are correct that the Supreme Court of Delaware has ruled that Mr. Leighton has, under Delaware law, no standing to litigate any aspect of this matter having acquired his interest in Beatrice with knowledge (or at least notice) of the transaction about which he seeks to complain.

For each of these reasons, the pending motion shall be and is denied.

Very truly yours,

/s/ William T. Allen

cc: Register in Chancery

COURT OF CHANCERY

OF THE STATE OF DELAWARE

William T. Allen, Chancellor

Courthouse, Wilmington, Delaware 19801

July 6, 1987

Messsrs Leighton, Payson, Balotti, and Rosenthal

In re : Beatrice Company Litigation,

Civil Action No. 8248

Gentlemen:

Mr. Leighton has moved for reargument of my June 23, 1987 decision on his motion to open judgment in the captioned case. His letter in support of this latest request for relief, in my opinion, states no reason to deviate from my June 23 opinion. For that reason treating his letter as a motion for reargument, that motion will be denied.

Very truly yours,

William T.Allen

cc: Register in Chancery

COURT OF CHANCERY

OF THE STATE OF DELAWARE

William T.Allen, Chancellor July 24, 1987

Courthouse, Wilmington, Delaware 19801

Mr. William Leighton, 249 West 11th Street, New York, N.Y. 10014

Dear Mr. Leighton:

Your motion to vacate the order of April 16, 1986 in the captioned matter has been denied and your request for re-aargument of that ruling has been considered and denied as well. There is no purpose to be served by supplementing the record on a motion that has been decided. Your submission has, I see, been sent to the Register and so I imagine it will into the file of the matter at some point. I will not purport to now change the record upon which your motion was decided.

Very truly yours,

William T. Allen

cc: Robert K. Payson, Esquire, R. Franklin Balotti, Esquire, Joseph A. Rosenthal, Esquire, Register in Chancery

SUPREME COURT OF DELAWARE

Andrew T. Horsey, Clerk

Cathy L. Howard, Deputy Clerk

July 29, 1987

William Leighton * * *

Robert K. Payson, Esquire * * *

R. Franklin Balotti, Esquire * * *

Joseph A. Rosenthal, Esquire * * *

Re : Leighton v. Beatrice Co. et al.,
No. 231, 1987

The Notice of Appesal was filed in the above captioned matter with the Court on July 22, 1987. Pursuant to Supreme Court Rule 15(a)(i), the appellant's brief and appendix are due on or before September 7, 1987. The appellee's brief and appendix are due 30 days after service of the appellant's brief and appendix.

/s/ A.J. Horsey

Clerk

PROXY STATEMENT

BEATRICE COMPANIES, Inc.

Two North LaSalle Street

Chicago, Illinois 60602

SPECIAL MEETING OF STOCKHOLDERS

to be held April 11, 1986

PROSPECTUS

BCI HOLDINGS CORPORATION

9 West 57th Street, Suite 4170,

New York, N.Y. 10019

This Proxy Statement-Prospectus is being furnished to stockholders of Beatrice Companies, Inc., a Delaware corporation ("Beatrice"), in connection with the solicitation of proxies by the Board of Directors of Beatrice for use at the Special Meeting of Stockholders of Beatrice scheduled to be held on Friday,

April 11, 1986 at 1:00 P.M., New York City time, at the Westin Plaza, Fifth Avenue at 59th Street, New York, New York, and at any and all adjournments or postponements thereof (the "Special Meeting").

At the Special Meeting, stockholders will consider and vote upon a proposal to approve and adopt the Agreement and Plan of Merger, dated as of November 14, 1985 and modified on February 2, 1986 (as restated and modified, the "Merger Agreement"), among Beatrice, BCI Holdings Corporation , a Delaware corporation ("Holdings"), and BCI Merger Corporation, a Delaware corporation and a wholly owned subsidiary of Holdings ("Merger Sub"), pursuant to which (a) Merger Sub will be merged with and into Beatrice (the "Merger"), with Beatrice to be the surviving corporation all of the common stock of which will be

owned directly and indirectly by Holdings and (b) each share of common stock, without par value, of Beatrice (the "Beatrice" Common Stock") outstanding as of the time the Merger is consummated (the "Effective Time"), other than shares as to which appraisal rights are perfected under Delaware law (the "Dissenting Shares") and any shares which are held by Beatrice, Holdings or their subsidiaries (which will be cancelled), will be converted into the right ito receive $40 in cash plus 10/ 25 of a share of Cumulative Exchangeable Preferred Stock, par value $.01 per share, of Holdings (the "Holdings Preferred Stock" all as more fully described herein.

Holdings Preferred Stock will have a liquidation preference of $25 per share and bear cumulative quarterly dividends at an annual rate of 15.25%, payable

when, as and if declared out of funds legally available therefor, subject to significant contractual restrictions on the payment of cash dividends that will be contained in the debt financing agreements relating to the Merger.* * * Subject to contractual restrictions that will be contained in the debt financing agreements relating to the Merger, each share of Holdings Preferred Stock will be exchangeable, at the Option of Holdings, for $25 principal amount of 15.25% Junior Subordinated Debentures Due 2002 of Holdings (the "Exchange Debentures") which will mature on the first interest payment date after the sixteenth anniversary of the Effective Time and bear interest at the same rate as the dividend rate of the Holding Preferred Stock. Interest on the Exchange Debentures, if then issued, for six years

following the Effective Time may, at the option of Holdings, be paid in additional Exchange Debentures in a principal amount equal to the amount of interest not paid in cash. **It is currently anticipated that dividends on the Holdings Preferred Stock and interest on the Exchange Debentures, if then issued, for six years following the Effective Time will be paid in additional shares of Holdings Preferred Stock and additional Exchange Debentures, respectively. * * ***

THE HOLDINGS PREFERRED STOCK TO BE ISSUED IN THE MERGER AND THE EXCHANGE DEBENTURES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROXY STATEMENT-PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The date of this Proxy-Statement-Prospectus is March 11, 1986

Until June 9, 1986, all dealers effecting transactions in the registered securities, whether or not participating in this distribution, may be required to deliver a prospectus. This is in addition to the obligation of dealers to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

No. C-6432, In the Supreme Court of Texas

Texaco, Inc. Petitioner, v. Pennzoil Company, Respondent

On Application for a Writ of Error

Brief of the Securities and Exchange Commission, Amicus Curiae

Filed : July 22, 1987

Interest of the Securities and Exchange Commission and Summary of its Position

The Securities and Exchange Commission is the federal agency responsible for the administration and enforcement of the federal securities laws and rules thereunder. The Commission submits this brief amicus curiae to urge that this Court review whether the alleged contract between Pennzoil Company ("Pennzoil") and the Getty entities [1/] -- under which Pennzoil was to purchase Getty Oil Company ("Getty Oil") stock from the J. Paul Getty Museum

(the "Museum") -- violated Commission Rule 10b-13, 17 C.F.R. 240.10b-13.

Rule 10b-13 provides that no person who has made a tender offer for any security "shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security otherwise than pursuant to such tender offer". 17 C.F.R. 240.10b-13 (emphasis added). The purpose of the Rule is to protect shareholders in the tender offer from the harmful effects of purchases or arrangements to purchase made outside, and on terms or conditions different from,the tender offer, and to protect the integrity of the tender offer process by proscribing side deals that could render the tender offer a sham. The Court of Appeals below ruled that Pennzoil did not violate Rule 10b-13 when Pennzoil contracted with the Museum to purchase its Getty Oil stock at the same time that

Pennzoil had a tender offer for Getty Oil outstanding. The court proceeded from the incorrect assumption that Rule 10b-13 is violated only by an actual purchase of stock outside a tender offer, so that Pennzoil could have avoided any violation by obtaining an exemption from the Rule, or withdrawing its offer, prior to the actual purchase of othe Museum's shares.

It is clear , however, that the alleged contract between Pennzoil and Getty constituted an "arrangement" by Pennzoil to purchase Getty stock outside Pennzoil's own tender offer. This arrangement plainly violated Rule 10b-13.[2/] The lower court's construction of the Rule is at odds with the language and purpose of the Rule, is unduly restrictive, and would impede Commission efforts to enforce Rule 10b-13 **as well as private actions brought to enforce the Rule.** (petitioner's emphasis).

Furthermore, it is highly unlikely that, had an exemption been sought, on the basis of the facts in the record, it would have been granted. Pennzoil's agreement called for the Museum to be paid in advance of other shareholders, a timing difference of significant financial advantage to the Museum. In addition, while the Museum's payment was certain, the other shareholders' payment was conditioned on approval of a merger agreement. The record discloses no firm plan for compensating the other shareholders for these differences.

Finally, Pennzoil's contention that, to have violated Rule 10b-13, its transaction had to have been entered into with fraudulent intent, is wholly without basis. The Rule proscribes all transactions outside of a tender offer, not only those that are fraudulent. The

narrow construction of the Rule that Pennzoil urges would seriously impair the investor protections that the Rule, and the statutory provisions it is intended to implement, provide

To put the Rule 10b-13 issue in context here, Texaco, Inc. ("Texaco") argues that if the contract was in violation of the Rule, it was an illegal contract and therefore void, either under Section 29(b) of the Securities Exchange Act of 1934 [3/] or under state law, or was at least voidable by an appropriate party. Texaco urges that if the contract is void or voidable, it cannot be held liable for tortious interference with the contract. Pennzoil argues that there was no Rule 10b-13 lviolation and that Texaco has no standingto raise that issue.

The Commission will discuss the proper construction of Rule 10b-13 and the question of whether there was, on the

facts of this case, a violation of the Rule. The scope of Rule 10b-13 is a matter whose significance extends well beyond this case and the Commission believes it should therefore address that issue, and urge review of the issue by this Court. The Commission will not address any other issue in this case, including the ultimate issue of whether Texaco is liable for tortious interference with the alleged contract, and takes no position as to the outcome of this case. * * *

1/ The Getty entities" refers to, collectively, the Getty Oil Company, the J. Paul Getty Museum, and the Sarah C. Getty Trust.

2/ While Pennzoil could have sought an exemption from the Rule from the Commission prior to entering into the alleged contract, it never sought, much less obtained, one at that or any other time.

3/ 15 U.S.C. 78cc. Section 29(b) provides, in relevant part :

Every contract made in violation of any provision of this title or of any rule or regulation thereunder * * * shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation * * *.

12/ Such exemptions, the Commission stated in adopting the Rule, are to be granted "only in cases involving very special circumstances." Sec. Exch. Act Rel. No. 8712, 34 Fed. Reg. at 15,839. In addition to the Commission's exemptive authority, the Commission staff may give "no-action" letters in response to written inquiries regarding applicability of the securities laws or rules, such as Rule 10b-13, to proposed transactions. The staff may, in response to such requests, state that if the transaction is carried out as proposed, the staff will not recommend that the Commission task enforcement action. Alternatively, the staff may refuse to express such a "no-action" position. While the Commission virtually never brings

enforcement proceedings where the staff has taken a no-action position, such a no-action letter, unlike a Rule 10b-13 exemption, is not binding on the Commission and does not constitute a Commission determination that no violation has occurred. See, e.g. Professional Care Services, Inc.(available April 15, 1974), (1973-74) Fed. Sec. L. Rep. (CCH), p.79,770. See also Sec. Exch. Act Rel. No. 8410, 33 Fed. Reg. 14,801 (Oct. 3, 1968); III L. Loss, Securities Regulation 1895 (2d ed. 1961).